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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
500 PEARL STREET
NEW YORK, NEW YORK 10007-1312

CHAMBERS OF
SONIA SOTOMAYOR
UNITED STATES DISTRICT JUDGE

March 4, 1998

Hon. Orrin G. Hatch, Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I only yesterday received a letter dated January 15, 1998, from Daniel J. O'Callaghan opposing my appointment to the United States Court of Appeals, Second Circuit. Enclosed is a copy of the envelope in which this letter arrived, indicating that the letter was not mailed until March 2. I do not know why Mr. Callahan waited until now to send his letter. However, I write to clarify my contact with Mr. O'Callaghan and to respond to his allegations.

Mr. Callahan represented the plaintiff, Alison Clapp, in an action entitled Clapp v. LeBoeuf, Lamb, Leiby & McRae, et al., which came before me in 1993. Mr. Callahan is also Ms. Clapp's husband.

Ms. Clapp's action before me was one of a series of lawsuits she brought in state and federal courts arising out of the dissolution in 1989 of the New York law firm of LeBoeuf Lamb, of which Ms. Clapp had been a partner. The law firm immediately reconstituted in 1990, excluding Mrs. Clapp as a member. The plaintiff thereafter embarked on an extensive course of unsuccessful litigations alleging that the firm's 1989 dissolution and reformation violated New York's partnership laws.

Ms. Clapp's first lawsuit in federal court, which she brought in 1991, was assigned to the Hon. Robert P. Patterson. After Judge Patterson dismissed her federal claims (the dismissal was affirmed on appeal), Clapp v. Greene, 743 F. Supp. 273 (S.D.N.Y. 1990), aff'd, 930 F.2d 912 (2d Cir. 1991), Ms. Clapp filed two separate state court actions in New York Supreme Court, New York County. The consolidated lawsuits were dismissed in 1992 by Justice Diane Lebedeff. The New York Appellate Division, First Department, affirmed the dismissal on appeal and denied the plaintiff's requests for leave to appeal to the New York Court of Appeals. Ms. Clapp filed a Notice of Appeal to the New York Court of Appeals, which was dismissed in 1993.

Thereafter, on November 23, 1993, Ms. Clapp, still represented by Mr. O'Callaghan, commenced a new federal action that was assigned to me. In addition to LeBoeuf Lamb, the lawsuit named as defendants Justice Lebedeff of the Supreme Court of the State of New York, and ten Justices of the Appellate Division of the Supreme Court of the State of New York, First Department. The lawsuit claimed, among other things, that the Justices had misinterpreted state law and conspired with LeBoeuf Lamb to deprive her of due process. As a result, Ms. Clapp sought declaratory and injunctive relief.

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With respect to Mr. O'Callaghan's allegations concerning my relationship with Judge Cabranes, please note that Judge Cabranes did not participate in the decision rendered by the Second Circuit. Let me further state that while Judge Cabranes is a friend, our relationship has never interfered with our professional responsibilities as United States Judges.

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U.S.C. § 1927, for improper conduct designed for the sole purpose of delay (including an attempt by Mr. O'Callaghan to use deposition testimony of supposedly unavailable witnesses whom Judge Lowe found to be at home when she made a phone call), and (iii) under both Rule 11 and § 1927, for filing frivolous sanctions motions that were "completely baseless and without merit." Ultimately, in an Order dated July 24, 1996, Judge Lowe sanctioned Mr. O'Callaghan in the sum of $16,400 for his misconduct. A copy of the Order, which is unpublished, is attached.

SDNY

93-cv-8084

SOTOMAYOR

JMW

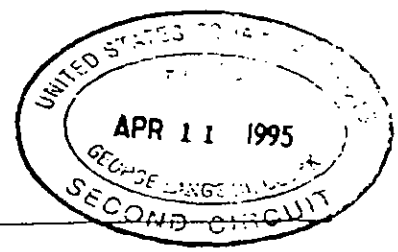
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of April , one thousand, nine hundred and ninety-five.

Present:

Honorable Wilfred Feinberg,
Honorable John M. Walker, Jr.,
Honorable José A. Cabranes,
Circuit Judges.



ALISON E. CLAPP,

Plaintiff-Appellant,

v.

ORDER
No. 94-9002

LeBOEUF, LAMB, LEIBY & MacRAE, DONALD J. GREENE, DONALD J. GREENE, P.C., TAYLOR R. BRIGGS, TAYLOR R. BRIGGS P.C., ALAN M. BERMAN, GEOFFREY D.C. BEST, DAVID P. BICKS, DAVID P. BICKS, P.C., CHARLES W. HAVENS, III, CHARLES W. HAVENS III, P.C., DOUGLAS W. HAWES, DOUGLAS W. HAWES, P.C., CARL D. HOBELMAN, CARL D. HOBELMAN, CHARTERED, RONALD D. JONES, RONALD D. JONES, P.C., GRANT S. LEWIS, GRANT S. LEWIS, P.C., CAMERON F. MacRAE III, CAMERON F. MacRAE, III P.C., SAMUEL M. SUGDEN, SAMUEL M. SUGDEN, P.C., collectively THE LeBOEUF, LAMB, LEIBY & MacRAE "ADMINISTRATIVE COMMITTEE", LeBOEUF, LAMB, LEIBY, & MacRAE, IRVING MOSKOVITZ, PETER N. SCHILLER, JOHN A. YOUNG, JOHN C. RICHARDSON, JOHN C. RICHARDSON, P.C., HON. DIANE A. LEBEDEFF, INDIVIDUALLY AND IN HER PAST OR PRESENT OFFICIAL CAPACITY AS JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, HON. JOSEPH P. SULLIVAN, HON. RICHARD W. WALLACH, HON. THEODORE R. KUPFERMAN, HON. DAVID ROSS, HON. BETTY WEINBERG ELLERIN, HON. FRANCIS T. MURPHY, HON. JOHN CARRO, HON. BENTLY KASSAL, HON. GEORGE BUNDY SMITH AND HON. ERNST H. ROSENBERGER, EACH INDIVIDUALLY AND IN HIS/HER PAST OR PRESENT OFFICIAL CAPACITIES AS

Docket No. 94-9002

JUSTICES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT, (collectively THE "APPELLATE DIVISION", FIRST DEPARTMENT),

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York (Sonia Sotomayor, Judge), and was submitted after counsel for appellant in open court waived oral argument after he was notified that his Motion for Adjournment and Reassignment was denied.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

Alison E. Clapp's appeal comes before us following protracted litigation in both state and federal court. Her numerous actions concern her exclusion from partnership in LeBoeuf, Lamb, Leiby & MacRae ("LLL&M") where she was a partner from 1986 until 1989, when the partnership dissolved and reconstituted on January 1, 1990. The newly formed partnership excluded Clapp and twenty-eight other attorneys.

Clapp's series of lawsuits began in federal court. After her federal claims were dismissed, Clapp v. Greene, 743 F. Supp. 273 (S.D.N.Y. 1990), aff'd, 930 F.2d 912 (2d Cir. 1991), Clapp filed two separate state court actions in New York Supreme Court, New York County, alleging that the firm's 1989 dissolution and reformation violated New York's partnership laws. The consolidated lawsuits were dismissed by summary judgment, Clapp v. LeBoeuf, Lamb, Leiby & MacRae, No. 15586/91 (N.Y. Sup. Ct. Mar. 18, 1992) (Diane A. Lebedeff, Justice), and affirmed on appeal, Clapp v. LaBouef, Lamb, Leiby & MacRae, No. 46946 (N.Y. App. Div. Dec. 15, 1992). The First Department denied Clapp's requests for leave to appeal to the Court of Appeals. Nevertheless, Clapp filed a Notice of Appeal as of right to the New York Court of Appeals, which was dismissed because "no substantial constitutional question [was] directly involved." Clapp v. LeBoeuf, Lamb, Leiby & MacRae, No. 493 SSD 23, (N.Y. May 6, 1993).

On November 23, 1993 Clapp commenced the action now on appeal against LLL&M, its partners, Justice Lebedeff, and the judges of the Appellate Division, First Department. She alleged that: 1)

the state courts' interpretation of New York's partnership laws was erroneous, 2) the partnership laws were constitutionally invalid as applied to her, 3) LLL&M was liable under 42 U.S.C. § 1983 for constitutionally depriving her of her property by divesting her of her partnership interest, 4) LLL&M and the State defendants conspired to deprive her of that interest without due process of law, and 5) the judicial procedure in state court deprived her of a full opportunity to present her claims. As a result, Clapp sought declaratory and injunctive relief.

Defendants argued in the district court that under the doctrine established by District of Columbia Court of Appeals v. Feldman, 460 U.S. 461 (1983), and Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), the district court did not have jurisdiction over appellant's claims. Nevertheless, the district court retained jurisdiction and granted defendants' motions to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). It held that Clapp had not demonstrated that the dissolution of the at-will partnership implicated a constitutionally protected liberty interest. The court added that even if such a property interest were at stake, LLL&M could not be construed as a state actor under the circumstances and the State defendants, who acted in their judicial capacities, were immune from suit by Clapp.

We assume, without deciding, that the district court did have jurisdiction. We have considered all of plaintiff-appellant's contentions advanced on this appeal, and we affirm substantially for the reasons given in Judge Sotomayor's comprehensive and well-reasoned opinion. See Clapp v. LeBoeuf, Lamb, Leiby & MacRae, No. 93 Civ. 8084 (SS) (S.D.N.Y. Aug. 19, 1994).

Hon. José A. Cabranes did not participate in the decision in this case. Pursuant to Local Rule § 0.14, the two remaining judges decided this appeal.

Wilfred Feinberg
Hon. Wilfred Feinberg, U.S.C.J.

John M. Walker
Hon. John M. Walker, Jr., U.S.C.J.

closed 1/27/93

#168

ORDER

Merex A.G., et. al. v. Fairchild Weston Systems, Inc.,
85 Civ. 6596 (MJL)

Before the Court is (1) Defendant's attorney's fee application in connection with its motion for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure ("Rule 11") and 28 U.S.C. § 1927 ("Section 1927");[1] and (2) the affidavit of Plaintiff's attorney, Daniel J. O'Callaghan, stating his inability to pay a sanction. For the reasons stated below, the Court grants Defendant a fee of $16,400.

BACKGROUND

The parties in this suit have been involved in extensive litigation since 1985. The Court's latest Opinion and Order, dated April 29, 1996 ("April 29 Opinion"), granted in part and denied in part Defendant's motion for sanctions against Plaintiff's attorney Daniel J. O'Callaghan. In the April 29 Opinion, the Court ordered: (1) Defendant to submit an affidavit listing its excess fees and costs associated with Mr. O'Callaghan's improper conduct; and (2) Mr. O'Callaghan to submit an affidavit detailing his ability to pay a sanction.

In response to the Court's request, Defendant filed an affidavit stating that it incurred at least $21,400 in excess costs and attorney's fees defending itself against Mr. O'Callaghan's sanctioned conduct. Specifically, Defendant estimates that it expended:

- $15,000[2] responding to Mr. O'Callaghan's meritless December 1988 Rule 37 motion;

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[1] By Opinion and Order dated April 29, 1996, this Court granted in part and denied in part Defendant's motion for sanctions against Plaintiff's attorney, Daniel J. O'Callaghan.

[2] This figure includes costs and fees necessary to (1) respond to the initial motion papers; (2) respond to the 86-page reply affirmation in support of the Rule 37 motion; (3) participate in oral argument before Magistrate Judge Buchwald; (4) respond to Mr. O'Callaghan's motion for reconsideration of Magistrate Buchwald's denial of the Rule 37 motion; and (5) participate in the hearing on the reconsideration motion. The figure is an estimate based on 10% of the total amount ($150,000) paid by Defendant to the law firm of McGarrahan & Heard from December, 1988, through December, 1989, for (1) the legal services required to defend against the Rule 37 motion, (2) various depositions and other discovery tasks, and (3) various internal trial preparation tasks. Defendant, however, has failed to provide a specific breakdown of the hours McGarrahan & Heard expended on the services necessary to defend against this motion.

- $1,365[3] responding to Mr. O'Callaghan's improper attempts to introduce deposition testimony during trial;

- $3,415[4] responding to Mr. O'Callaghan's failure to follow the Court's pre-trial rules; and

- $1,620[5] responding to Mr. O'Callaghan's continuous attempts during trial to reargue various adverse rulings by this Court.

In response to the Court's request, Mr. O'Callaghan submitted a convoluted affidavit stating that he is currently facing financial hardship and is, therefore, unable to pay a monetary sanction. In particular, Mr. O'Callaghan contends that:

- he was required to pay approximately $20,000 in medical bills after his wife was dismissed by her employer and subsequently precluded from earning a living as an attorney;

- as a result of a number of defeats before the Second Circuit in what he alleges were "a series of exceedingly unfair . . . rulings," he was forced to sell his personal residence at a loss of $75,000 and borrow $25,000 from family members;

- as a result of these losses, he was also forced to withdraw $70,000 from a retirement account[6];

- as a result of these losses and the termination of his services by a litigant he represented before the Second Circuit, he is no longer able to earn a living from the practice of law and has decided to cease practicing law entirely;

- he expects earning a net income of $20,000 this year from his law practice and plans to convert his one remaining

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[3] This estimate is based on three hours of work by Defendant's attorney, Roy A. Klein, and his associate, Ronald W. Weiner, at the hourly rates of $250 and $205 respectively.

[4] This estimate is based on 13 hours spent by Mr. Weiner and 3 hours spent by Mr. Klein on legal tasks prior to and during trial as a result of Mr. O'Callaghan's misconduct.

[5] This estimate is based on four hours of additional work by both Mr. Klein and Mr. Weiner during the course of the trial due to Mr. O'Callaghan's frivolous attempts to reargue.

[6] Mr. O'Callaghan admits, however, that during the past two years he has been able to reimburse this account in full.

asset -- a residential frame house in Brooklyn, New York -- into a multi-family residence as a means to generate future income.

DISCUSSION

I. Excess Costs

The Court finds that Defendant's request for $15,000 to compensate its defense against Plaintiff's Rule 37 motion is excessive given the frivolity of the motion, Mr. Klein's failure to provide the Court with a specific breakdown of the hours he expended in response to the motion, and Mr. O'Callaghan's financial condition. See infra p. 3. Courts have reduced fee requests, despite the sanctionable conduct of an opposing counsel, when such requests are unreasonable. See Nassau-Suffolk Ice Cream, Inc., v. Integrated Resources, Inc., 114 F.R.D. 684, 692-93 (S.D.N.Y. 1987) (reducing defendant's reimbursement claim of $36,831.89 to $13,986.06 where no legal maneuvers or substantive motion practice was necessary). Accordingly, the Court imposes a smaller award than the one Defendant seeks. See infra p. 4.

II. Mr. O'Callaghan's Ability to Pay

Although it is entirely plausible that Mr. O'Callaghan will cease practicing law, given the series of legal losses he has recently experienced, his financial inability to pay any sanction appears overstated. Clearly, if Mr. O'Callaghan was able to fully reimburse the $70,000 withdrawal from his retirement account during the last two years, he has a steady amount of disposable income. Moreover, Mr. O'Callaghan expects to derive rental income from a residential frame-house he owns. Finally, having paid off his wife's alleged medical bills, he remains indebted only to family members.

Nevertheless, the sanctioning court should carefully consider the effect that an award will have on the sanctioned party. See Oliveri v. Thompson, 803 F.2d 1265, 1281 (2d Cir. 1986) (holding that courts may "temper the amount to be awarded against an offending attorney by a balancing consideration of his ability to pay"), cert. denied, 480 U.S. 918 (1987); Omega Trust, et. al. v. Christian de Ville de Goyet, 120 B.R. 265, 271 (S.D.N.Y. 1990) (affirming Bankruptcy Court's imposition of sanctions but reversing monetary award because the lower court failed to adequately consider the offender's ability to pay a sanction). Because Mr. O'Callaghan expects a modest net income for 1996, still owes $25,000 in family debt, and plans to cease practicing law, he is likely unable to pay the entire amount Defendant seeks.

III. Additional Considerations

As Defendant indicates, this case is not the first time that Mr. O'Callaghan has faced rebuke by courts. Although it appears no Court has formally sanctioned Mr. O'Callaghan, judges have reprimanded him on several occasions. These include the following instances: (1) in a recent action Plaintiff filed against Defendant in the Eastern District of New York,[7] Judge Spatt granted Defendant's motion to dismiss on res judicata and statute of limitations grounds and added that he was "sorely tempted to impose sanctions" against Mr. O'Callaghan. Oct. 13, 1995 hearing transcript at 19-20; (2) in Clapp v. Greene, 743 F. Supp. 273 (S.D.N.Y.),[8] Judge Patterson dismissed the claims Mr. O'Callaghan brought on behalf of his wife and admonished Mr. O'Callaghan, finding his "conduct unbecoming a member of the bar of this Court," id. at 278; and (3) in Clapp v. LeBoeuf Lamb, 862 F. Supp. 1050 (S.D.N.Y. 1994),[9] Judge Sotomayer granted defendants' motion to dismiss and criticized Mr. O'Callaghan for (i) making "turgid" submissions, id. at 1053; (ii) often refusing to answer the Court's questions, id. at 1055; and (iii) burdening the court with "needless and convoluted submissions," id. at 1061. Mr. O'Callaghan's persistent misconduct in the face of judicial reprimands and the utter frivolity of his Rule 37 motion compels the Court to impose a firm -- yet fair -- sanction.

IV. Amount of Sanctions

The Court finds that Defendant's request for excess fees and costs should be reduced. Specifically, the Court awards Defendant $10,000 rather than the $15,000 it seeks for its defense against Plaintiff's Rule 37 motion. The Court, however, grants Defendant's remaining requests in full: (1) $1,365 for its response to Mr. O'Callaghan's improper attempts to introduce deposition testimony; (2) $3,415 for its response to Mr. O'Callaghan's failure to follow the Court's pre-trial rules; and (3) $1,620 for its response to Mr. O'Callaghan's repeated attempts to reargue adverse rulings by this Court. In sum, the Court imposes a $16,400 sanction against Mr. O'Callaghan.

---

[7] In this suit, Mr. O'Callaghan attempted to renew the claim of tortious interference he had raised against Defendant in this Court ten years earlier.

[8] In this suit, Mr. O'Callaghan represented his wife in her action against the law firm that terminated her partnership.

[9] In this suit, Mr. O'Callaghan represented his wife in her civil rights action against (1) the same law firm that terminated her as partner and (2) the state court judges that upheld the partnership's right to terminate her.

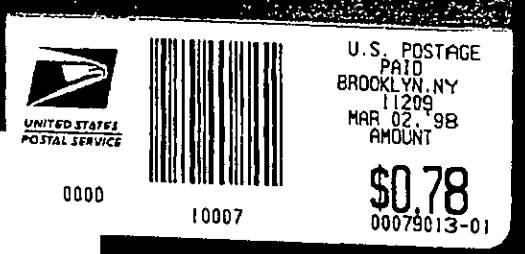
CONCLUSION

Based on the foregoing, the Court imposes a monetary sanction upon Mr. O'Callaghan in the amount of $16,400. The Court encourages Mr. O'Callaghan not to seek reargument of this Order.

It is SO ORDERED.

Dated: New York, New York
July 20, 1996

United States District Judge



DANIEL J. O'CALLAGHAN
ATTORNEY AT LAW
17 BATTERY PLACE
NEW YORK, N.Y. 10004

To: Hon. Sonia Sotomayor
United States District Judge
United States Courthouse
500 Pearl Street, Room 1340
New York, NY 10007-1312

FIRST CLASS MAIL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
500 PEARL STREET
NEW YORK, NEW YORK 10007-1312

CHAMBERS OF
SONIA SOTOMAYOR
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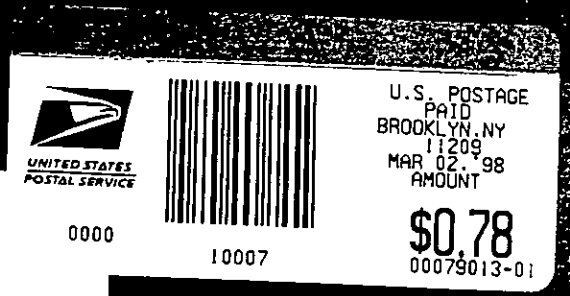

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FIRST CLASS MAIL

the state courts' interpretation of New York's partnership laws was erroneous, 2) the partnership laws were constitutionally invalid as applied to her, 3) LLL&M was liable under 42 U.S.C. § 1983 for constitutionally depriving her of her property by divesting her of her partnership interest, 4) LLL&M and the State defendants conspired to deprive her of that interest without due process of law, and 5) the judicial procedure in state court deprived her of a full opportunity to present her claims. As a result, Clapp sought declaratory and injunctive relief.

Defendants argued in the district court that under the doctrine established by District of Columbia Court of Appeals v. Feldman, 460 U.S. 461 (1983), and Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), the district court did not have jurisdiction over appellant's claims. Nevertheless, the district court retained jurisdiction and granted defendants' motions to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). It held that Clapp had not demonstrated that the dissolution of the at-will partnership implicated a constitutionally protected liberty interest. The court added that even if such a property interest were at stake, LLL&M could not be construed as a state actor under the circumstances and the State defendants, who acted in their judicial capacities, were immune from suit by Clapp.

We assume, without deciding, that the district court did have jurisdiction. We have considered all of plaintiff-appellant's contentions advanced on this appeal, and we affirm substantially for the reasons given in Judge Sotomayor's comprehensive and well-reasoned opinion. See Clapp v. LeBoeuf, Lamb, Leiby & MacRae, No. 93 Civ. 8084 (SS) (S.D.N.Y. Aug. 19, 1994).

Hon. José A. Cabranes did not participate in the decision in this case. Pursuant to Local Rule § 0.14, the two remaining judges decided this appeal.

Wilfred Feinberg

Hon. Wilfred Feinberg, U.S.C.J.

John M. Walker

Hon. John M. Walker, Jr., U.S.C.J.

asset -- a residential frame house in Brooklyn, New York -- into a multi-family residence as a means to generate future income.

DISCUSSION

I. Excess Costs

The Court finds that Defendant's request for $15,000 to compensate its defense against Plaintiff's Rule 37 motion is excessive given the frivolity of the motion, Mr. Klein's failure to provide the Court with a specific breakdown of the hours he expended in response to the motion, and Mr. O'Callaghan's financial condition. See infra p. 3. Courts have reduced fee requests, despite the sanctionable conduct of an opposing counsel, when such requests are unreasonable. See Nassau-Suffolk Ice Cream, Inc., v. Integrated Resources, Inc., 114 F.R.D. 684, 692-93 (S.D.N.Y. 1987) (reducing defendant's reimbursement claim of $36,831.89 to $13,986.06 where no legal maneuvers or substantive motion practice was necessary). Accordingly, the Court imposes a smaller award than the one Defendant seeks. See infra p. 4.

II. Mr. O'Callaghan's Ability to Pay

Although it is entirely plausible that Mr. O'Callaghan will cease practicing law, given the series of legal losses he has recently experienced, his financial inability to pay any sanction appears overstated. Clearly, if Mr. O'Callaghan was able to fully reimburse the $70,000 withdrawal from his retirement account during the last two years, he has a steady amount of disposable income. Moreover, Mr. O'Callaghan expects to derive rental income from a residential frame-house he owns. Finally, having paid off his wife's alleged medical bills, he remains indebted only to family members.

Nevertheless, the sanctioning court should carefully consider the effect that an award will have on the sanctioned party. See Oliveri v. Thompson, 803 F.2d 1265, 1281 (2d Cir. 1986) (holding that courts may "temper the amount to be awarded against an offending attorney by a balancing consideration of his ability to pay"), cert. denied, 480 U.S. 918 (1987); Omega Trust, et. al. v. Christian de Ville de Goyet, 120 B.R. 265, 271 (S.D.N.Y. 1990) (affirming Bankruptcy Court's imposition of sanctions but reversing monetary award because the lower court failed to adequately consider the offender's ability to pay a sanction). Because Mr. O'Callaghan expects a modest net income for 1996, still owes $25,000 in family debt, and plans to cease practicing law, he is likely unable to pay the entire amount Defendant seeks.

III. Additional Considerations

As Defendant indicates, this case is not the first time that Mr. O'Callaghan has faced rebuke by courts. Although it appears no Court has formally sanctioned Mr. O'Callaghan, judges have reprimanded him on several occasions. These include the following instances: (1) in a recent action Plaintiff filed against Defendant in the Eastern District of New York,[7] Judge Spatt granted Defendant's motion to dismiss on res judicata and statute of limitations grounds and added that he was "sorely tempted to impose sanctions" against Mr. O'Callaghan. Oct. 13, 1995 hearing transcript at 19-20; (2) in Clapp v. Greene, 743 F. Supp. 273 (S.D.N.Y.),[8] Judge Patterson dismissed the claims Mr. O'Callaghan brought on behalf of his wife and admonished Mr. O'Callaghan, finding his "conduct unbecoming a member of the bar of this Court," id. at 278; and (3) in Clapp v. LeBoeuf Lamb, 862 F. Supp. 1050 (S.D.N.Y. 1994),[9] Judge Sotomayer granted defendants' motion to dismiss and criticized Mr. O'Callaghan for (i) making "turgid" submissions, id. at 1053; (ii) often refusing to answer the Court's questions, id. at 1055; and (iii) burdening the court with "needless and convoluted submissions," id. at 1061. Mr. O'Callaghan's persistent misconduct in the face of judicial reprimands and the utter frivolity of his Rule 37 motion compels the Court to impose a firm -- yet fair -- sanction.

IV. Amount of Sanctions

The Court finds that Defendant's request for excess fees and costs should be reduced. Specifically, the Court awards Defendant $10,000 rather than the $15,000 it seeks for its defense against Plaintiff's Rule 37 motion. The Court, however, grants Defendant's remaining requests in full: (1) $1,365 for its response to Mr. O'Callaghan's improper attempts to introduce deposition testimony; (2) $3,415 for its response to Mr. O'Callaghan's failure to follow the Court's pre-trial rules; and (3) $1,620 for its response to Mr. O'Callaghan's repeated attempts to reargue adverse rulings by this Court. In sum, the Court imposes a $16,400 sanction against Mr. O'Callaghan.

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[7] In this suit, Mr. O'Callaghan attempted to renew the claim of tortious interference he had raised against Defendant in this Court ten years earlier.

[8] In this suit, Mr. O'Callaghan represented his wife in her action against the law firm that terminated her partnership.

[9] In this suit, Mr. O'Callaghan represented his wife in her civil rights action against (1) the same law firm that terminated her as partner and (2) the state court judges that upheld the partnership's right to terminate her.

CONCLUSION

Based on the foregoing, the Court imposes a monetary sanction upon Mr. O'Callaghan in the amount of $16,400. The Court encourages Mr. O'Callaghan not to seek reargument of this Order.

It is SO ORDERED.

Dated: New York, New York
July 24, 1996

United States District Judge

SDNY
93-cv-8084
SOTOMAYOR

JMW

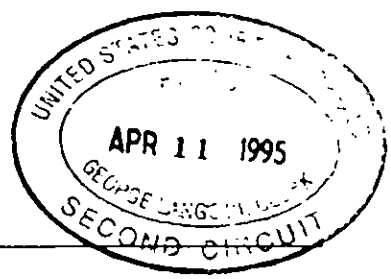
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of April , one thousand, nine hundred and ninety-five.

Present:

Honorable Wilfred Feinberg,
Honorable John M. Walker, Jr.,
Honorable José A. Cabranes,
Circuit Judges.



ALISON E. CLAPP,

Plaintiff-Appellant,

v.

O R D E R
No. 94-9002

LeBOEUF, LAMB, LEIBY & MacRAE, DONALD J. GREENE, DONALD J. GREENE, P.C., TAYLOR R. BRIGGS, TAYLOR R. BRIGGS P.C., ALAN M. BERMAN, GEOFFREY D.C. BEST, DAVID P. BICKS, DAVID P. BICKS, P.C., CHARLES W. HAVENS, III, CHARLES W. HAVENS III, P.C., DOUGLAS W. HAWES, DOUGLAS W. HAWES, P.C., CARL D. HOBELMAN, CARL D. HOBELMAN, CHARTERED, RONALD D. JONES, RONALD D. JONES, P.C., GRANT S. LEWIS, GRANT S. LEWIS, P.C., CAMERON F. MacRAE III, CAMERON F. MacRAE, III P.C., SAMUEL M. SUGDEN, SAMUEL M. SUGDEN, P.C., collectively THE LeBOEUF, LAMB, LEIBY & MacRAE "ADMINISTRATIVE COMMITTEE", LeBOEUF, LAMB, LEIBY, & MacRAE, IRVING MOSKOVITZ, PETER N. SCHILLER, JOHN A. YOUNG, JOHN C. RICHARDSON, JOHN C. RICHARDSON, P.C., HON. DIANE A. LEBEDEFF, INDIVIDUALLY AND IN HER PAST OR PRESENT OFFICIAL CAPACITY AS JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, HON. JOSEPH P. SULLIVAN, HON. RICHARD W. WALLACH, HON. THEODORE R. KUPFERMAN, HON. DAVID ROSS, HON. BETTY WEINBERG ELLERIN, HON. FRANCIS T. MURPHY, HON. JOHN CARRO, HON. BENTLY KASSAL, HON. GEORGE BUNDY SMITH AND HON. ERNST H. ROSENBERGER, EACH INDIVIDUALLY AND IN HIS/HER PAST OR PRESENT OFFICIAL CAPACITIES AS

Docket No. 94-9002

JUSTICES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT, (collectively THE "APPELLATE DIVISION", FIRST DEPARTMENT),

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York (Sonia Sotomayor, Judge), and was submitted after counsel for appellant in open court waived oral argument after he was notified that his Motion for Adjournment and Reassignment was denied.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

Alison E. Clapp's appeal comes before us following protracted litigation in both state and federal court. Her numerous actions concern her exclusion from partnership in LeBoeuf, Lamb, Leiby & MacRae ("LLL&M") where she was a partner from 1986 until 1989, when the partnership dissolved and reconstituted on January 1, 1990. The newly formed partnership excluded Clapp and twenty-eight other attorneys.

Clapp's series of lawsuits began in federal court. After her federal claims were dismissed, Clapp v. Greene, 743 F. Supp. 273 (S.D.N.Y. 1990), aff'd, 930 F.2d 912 (2d Cir. 1991), Clapp filed two separate state court actions in New York Supreme Court, New York County, alleging that the firm's 1989 dissolution and reformation violated New York's partnership laws. The consolidated lawsuits were dismissed by summary judgment, Clapp v. LeBoeuf, Lamb, Leiby & MacRae, No. 15586/91 (N.Y. Sup. Ct. Mar. 18, 1992) (Diane A. Lebedeff, Justice), and affirmed on appeal, Clapp v. LaBouef, Lamb, Leiby & MacRae, No. 46946 (N.Y. App. Div. Dec. 15, 1992). The First Department denied Clapp's requests for leave to appeal to the Court of Appeals. Nevertheless, Clapp filed a Notice of Appeal as of right to the New York Court of Appeals, which was dismissed because "no substantial constitutional question [was] directly involved." Clapp v. LeBoeuf, Lamb, Leiby & MacRae, No. 493 SSD 23, (N.Y. May 6, 1993).

On November 23, 1993 Clapp commenced the action now on appeal against LLL&M, its partners, Justice Lebedeff, and the judges of the Appellate Division, First Department. She alleged that: 1)

Clerk's 1/27/97

#168

U.S.C.J. JUL 24 S.D. OF N.Y.

ORDER

Merex A.G., et. al. v. Fairchild Weston Systems, Inc.,
85 Civ. 6596 (MJL)

Before the Court is (1) Defendant's attorney's fee application in connection with its motion for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure ("Rule 11") and 28 U.S.C. § 1927 ("Section 1927");[1] and (2) the affidavit of Plaintiff's attorney, Daniel J. O'Callaghan, stating his inability to pay a sanction. For the reasons stated below, the Court grants Defendant a fee of $16,400.

BACKGROUND

The parties in this suit have been involved in extensive litigation since 1985. The Court's latest Opinion and Order, dated April 29, 1996 ("April 29 Opinion"), granted in part and denied in part Defendant's motion for sanctions against Plaintiff's attorney Daniel J. O'Callaghan. In the April 29 Opinion, the Court ordered: (1) Defendant to submit an affidavit listing its excess fees and costs associated with Mr. O'Callaghan's improper conduct; and (2) Mr. O'Callaghan to submit an affidavit detailing his ability to pay a sanction.

In response to the Court's request, Defendant filed an affidavit stating that it incurred at least $21,400 in excess costs and attorney's fees defending itself against Mr. O'Callaghan's sanctioned conduct. Specifically, Defendant estimates that it expended:

- $15,000[2] responding to Mr. O'Callaghan's meritless December 1988 Rule 37 motion;

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[1] By Opinion and Order dated April 29, 1996, this Court granted in part and denied in part Defendant's motion for sanctions against Plaintiff's attorney, Daniel J. O'Callaghan.

[2] This figure includes costs and fees necessary to (1) respond to the initial motion papers; (2) respond to the 86-page reply affirmation in support of the Rule 37 motion; (3) participate in oral argument before Magistrate Judge Buchwald; (4) respond to Mr. O'Callaghan's motion for reconsideration of Magistrate Buchwald's denial of the Rule 37 motion; and (5) participate in the hearing on the reconsideration motion. The figure is an estimate based on 10% of the total amount ($150,000) paid by Defendant to the law firm of McGarrahan & Heard from December, 1988, through December, 1989, for (1) the legal services required to defend against the Rule 37 motion,. (2) various depositions and other discovery tasks, and (3) various internal trial preparation tasks. Defendant, however, has failed to provide a specific breakdown of the hours McGarrahan & Heard expended on the services necessary to defend against this motion.

- $1,365[3] responding to Mr. O'Callaghan's improper attempts to introduce deposition testimony during trial;

- $3,415[4] responding to Mr. O'Callaghan's failure to follow the Court's pre-trial rules; and

- $1,620[5] responding to Mr. O'Callaghan's continuous attempts during trial to reargue various adverse rulings by this Court.

In response to the Court's request, Mr. O'Callaghan submitted a convoluted affidavit stating that he is currently facing financial hardship and is, therefore, unable to pay a monetary sanction. In particular, Mr. O'Callaghan contends that:

- he was required to pay approximately $20,000 in medical bills after his wife was dismissed by her employer and subsequently precluded from earning a living as an attorney;

- as a result of a number of defeats before the Second Circuit in what he alleges were "a series of exceedingly unfair . . . rulings," he was forced to sell his personal residence at a loss of $75,000 and borrow $25,000 from family members;

- as a result of these losses, he was also forced to withdraw $70,000 from a retirement account[6];

- as a result of these losses and the termination of his services by a litigant he represented before the Second Circuit, he is no longer able to earn a living from the practice of law and has decided to cease practicing law entirely;

- he expects earning a net income of $20,000 this year from his law practice and plans to convert his one remaining

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[3] This estimate is based on three hours of work by Defendant's attorney, Roy A. Klein, and his associate, Ronald W. Weiner, at the hourly rates of $250 and $205 respectively.

[4] This estimate is based on 13 hours spent by Mr. Weiner and 3 hours spent by Mr. Klein on legal tasks prior to and during trial as a result of Mr. O'Callaghan's misconduct.

[5] This estimate is based on four hours of additional work by both Mr. Klein and Mr. Weiner during the course of the trial due to Mr. O'Callaghan's frivolous attempts to reargue.

[6] Mr. O'Callaghan admits, however, that during the past two years he has been able to reimburse this account in full.

March 4, 1998

Hon. Orrin G. Hatch, Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I only yesterday received a letter dated January 15, 1998, from Daniel J. O'Callaghan opposing my appointment to the United States Court of Appeals, Second Circuit. Enclosed is a copy of the envelope in which this letter arrived, indicating that the letter was not mailed until March 2. I do not know why Mr. Callahan waited until now to send his letter. However, I write to clarify my contact with Mr. O'Callaghan and to respond to his allegations.

Mr. Callahan represented the plaintiff, Alison Clapp, in an action entitled Clapp v. LeBoeuf, Lamb, Leiby & McRae, et al., which came before me in 1993. Mr. Callahan is also Ms. Clapp's husband.

Ms. Clapp's action before me was one of a series of lawsuits she brought in state and federal courts arising out of the dissolution in 1989 of the New York law firm of LeBoeuf Lamb, of which Ms. Clapp had been a partner. The law firm immediately reconstituted in 1990, excluding Mrs. Clapp as a member. The plaintiff thereafter embarked on an extensive course of unsuccessful litigations alleging that the firm's 1989 dissolution and reformation violated New York's partnership laws.

Ms. Clapp's first lawsuit in federal court, which she brought in 1991, was assigned to the Hon. Robert P. Patterson. After Judge Patterson dismissed her federal claims (the dismissal was affirmed on appeal), Clapp v. Greene, 743 F. Supp. 273 (S.D.N.Y. 1990), aff'd, 930 F.2d 912 (2d Cir. 1991), Ms. Clapp filed two separate state court actions in New York Supreme Court, New York County. The consolidated lawsuits were dismissed in 1992 by Justice Diane Lebedeff. The New York Appellate Division, First Department, affirmed the dismissal on appeal and denied the plaintiff's requests for leave to appeal to the New York Court of Appeals. Ms. Clapp filed a Notice of Appeal to the New York Court of Appeals, which was dismissed in 1993.

Thereafter, on November 23, 1993, Ms. Clapp, still represented by Mr. O'Callaghan, commenced a new federal action that was assigned to me. In addition to LeBoeuf Lamb, the lawsuit named as defendants Justice Lebedeff of the Supreme Court of the State of New York, and ten Justices of the Appellate Division of the Supreme Court of the State of New York, First Department. The lawsuit claimed, among other things, that the Justices had misinterpreted state law and conspired with LeBoeuf Lamb to deprive her of due process. As a

result, Ms. Clapp sought declaratory and injunctive relief.

In a lengthy opinion evaluating the claims at issue, I dismissed the plaintiff's action on two grounds: first, that the federal courts lacked jurisdiction over the plaintiff's claims; and second, that the complaint failed to state a claim upon which relief could be granted. I also found that the State defendants, who had acted in their judicial capacities, were immune from suit. The Second Circuit affirmed the dismissal on appeal for essentially the same reasons given in my opinion. See Clapp v. LeBoeuf, Lamb, Leiby & McRae, et al., 862 F. Supp.1050 (S.D.N.Y. 1994), aff'd, 54 F.3d 765 (2d Cir.), cert. denied,. 516 U.S. 944 (1995). The Second Circuit's affirmance, which is unpublished, is attached.

I do not know why Mr. O'Callaghan believes I made a statement in court that I had a relationship to Justice Lebedeff. First, no such statement is in the transcript. Second, I have no memory of making such a statement. Finally, as I stated in my opinion in response to the this accusation when first raised by Mr. O'Callaghan, I would have had no basis upon which to make such a statement because I do not know Justice Lebedeff on a personal or social basis.[1]

With respect to Mr. O'Callaghan's allegations concerning my relationship with Judge Cabranes, please note that Judge Cabranes did not participate in the decision rendered by the Second Circuit. Let me further state that while Judge Cabranes is a friend, our relationship has never interfered with our professional responsibilities as United States Judges

Very truly yours,

Sonia Sotomayor

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[1]You may have an interest in at least two other cases in this district, in which Mr. O'Callaghan has been either admonished or sanctioned for unprofessional conduct. First, in the case originally dismissed by Judge Patterson, Clapp v. Greene, 743 F. Supp. 273, 278, Judge Patterson noted that Mr. O'Callaghan had delivered "six inches of papers" to chambers which were "identified as an undocketed mandamus petition that he [O'Callaghan] would be forced to file if the Court did not act in this case" within the next five days. Judge Patterson noted that he found "counsel's conduct unbecoming to a member of the bar of this Court."

Second, in Merex A.G. v. Fairchild Weston Systems, Inc., No. 85 Civ. 6596, 1996 WL 227826, 1996 U.S. Dist. Lexis 5946, Judge Mary Johnson Lowe sanctioned Mr. O'Callaghan (i) under Fed. R. Civ. P. 11, for filing claims that were "completely without merit," (ii) under 28 U.S.C. § 1927, for improper conduct designed for the sole purpose of delay (including an attempt by Mr. O'Callaghan to use deposition testimony of supposedly unavailable witnesses whom Judge Lowe found to be at home when she made a phone call), and (iii) under both Rule 11 and § 1927, for filing frivolous sanctions motions that were "completely baseless and without merit." Ultimately, in an Order dated July 24, 1996, Judge Lowe sanctioned Mr. O'Callaghan in the sum of $16,400 for his misconduct. A copy of the Order, which is unpublished, is attached.

SDNY
93-cv-8084
SOTOMAYOR

JMW

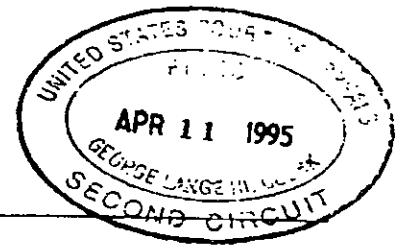
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of April , one thousand, nine hundred and ninety-five.

Present:

Honorable Wilfred Feinberg,
Honorable John M. Walker, Jr.,
Honorable José A. Cabranes,
Circuit Judges.



ALISON E. CLAPP,

Plaintiff-Appellant,

v.

ORDER
No. 94-9002

LeBOEUF, LAMB, LEIBY & MacRAE, DONALD J. GREENE, DONALD J. GREENE, P.C., TAYLOR R. BRIGGS, TAYLOR R. BRIGGS P.C., ALAN M. BERMAN, GEOFFREY D.C. BEST, DAVID P. BICKS, DAVID P. BICKS, P.C., CHARLES W. HAVENS, III, CHARLES W. HAVENS III, P.C., DOUGLAS W. HAWES, DOUGLAS W. HAWES, P.C., CARL D. HOBELMAN, CARL D. HOBELMAN, CHARTERED, RONALD D. JONES, RONALD D. JONES, P.C., GRANT S. LEWIS, GRANT S. LEWIS, P.C., CAMERON F. MacRAE III, CAMERON F. MacRAE, III P.C., SAMUEL M. SUGDEN, SAMUEL M. SUGDEN, P.C., collectively THE LeBOEUF, LAMB, LEIBY & MacRAE "ADMINISTRATIVE COMMITTEE", LeBOEUF, LAMB, LEIBY, & MacRAE, IRVING MOSKOVITZ, PETER N. SCHILLER, JOHN A. YOUNG, JOHN C. RICHARDSON, JOHN C. RICHARDSON, P.C., HON. DIANE A. LEBEDEFF, INDIVIDUALLY AND IN HER PAST OR PRESENT OFFICIAL CAPACITY AS JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, HON. JOSEPH P. SULLIVAN, HON. RICHARD W. WALLACH, HON. THEODORE R. KUPFERMAN, HON. DAVID ROSS, HON. BETTY WEINBERG ELLERIN, HON. FRANCIS T. MURPHY, HON. JOHN CARRO, HON. BENTLY KASSAL, HON. GEORGE BUNDY SMITH AND HON. ERNST H. ROSENBERGER, EACH INDIVIDUALLY AND IN HIS/HER PAST OR PRESENT OFFICIAL CAPACITIES AS

Docket No. 94-9002

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Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York (Sonia Sotomayor, Judge), and was submitted after counsel for appellant in open court waived oral argument after he was notified that his Motion for Adjournment and Reassignment was denied.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

Alison E. Clapp's appeal comes before us following protracted litigation in both state and federal court. Her numerous actions concern her exclusion from partnership in LeBoeuf, Lamb, Leiby & MacRae ("LLL&M") where she was a partner from 1986 until 1989, when the partnership dissolved and reconstituted on January 1, 1990. The newly formed partnership excluded Clapp and twenty-eight other attorneys.

Clapp's series of lawsuits began in federal court. After her federal claims were dismissed, Clapp v. Greene, 743 F. Supp. 273 (S.D.N.Y. 1990), aff'd, 930 F.2d 912 (2d Cir. 1991), Clapp filed two separate state court actions in New York Supreme Court, New York County, alleging that the firm's 1989 dissolution and reformation violated New York's partnership laws. The consolidated lawsuits were dismissed by summary judgment, Clapp v. LeBoeuf, Lamb, Leiby & MacRae, No. 15586/91 (N.Y. Sup. Ct. Mar. 18, 1992) (Diane A. Lebedeff, Justice), and affirmed on appeal, Clapp v. LaBouef, Lamb, Leiby & MacRae, No. 46946 (N.Y. App. Div. Dec. 15, 1992). The First Department denied Clapp's requests for leave to appeal to the Court of Appeals. Nevertheless, Clapp filed a Notice of Appeal as of right to the New York Court of Appeals, which was dismissed because "no substantial constitutional question [was] directly involved." Clapp v. LeBoeuf, Lamb, Leiby & MacRae, No. 493 SSD 23, (N.Y. May 6, 1993).

On November 23, 1993 Clapp commenced the action now on appeal against LLL&M, its partners, Justice Lebedeff, and the judges of the Appellate Division, First Department. She alleged that: 1)

the state courts' interpretation of New York's partnership laws was erroneous, 2) the partnership laws were constitutionally invalid as applied to her, 3) LLL&M was liable under 42 U.S.C. § 1983 for constitutionally depriving her of her property by divesting her of her partnership interest, 4) LLL&M and the State defendants conspired to deprive her of that interest without due process of law, and 5) the judicial procedure in state court deprived her of a full opportunity to present her claims. As a result, Clapp sought declaratory and injunctive relief.

Defendants argued in the district court that under the doctrine established by District of Columbia Court of Appeals v. Feldman, 460 U.S. 461 (1983), and Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), the district court did not have jurisdiction over appellant's claims. Nevertheless, the district court retained jurisdiction and granted defendants' motions to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). It held that Clapp had not demonstrated that the dissolution of the at-will partnership implicated a constitutionally protected liberty interest. The court added that even if such a property interest were at stake, LLL&M could not be construed as a state actor under the circumstances and the State defendants, who acted in their judicial capacities, were immune from suit by Clapp.

We assume, without deciding, that the district court did have jurisdiction. We have considered all of plaintiff-appellant's contentions advanced on this appeal, and we affirm substantially for the reasons given in Judge Sotomayor's comprehensive and well-reasoned opinion. See Clapp v. LeBoeuf, Lamb, Leiby & MacRae, No. 93 Civ. 8084 (SS) (S.D.N.Y. Aug. 19, 1994).

Hon. José A. Cabranes did not participate in the decision in this case. Pursuant to Local Rule § 0.14, the two remaining judges decided this appeal.

Wilfred Feinberg
Hon. Wilfred Feinberg, U.S.C.J.

John M. Walker
Hon. John M. Walker, Jr., U.S.C.J.

DANIEL J. O'CALLAGHAN
ATTORNEY AT LAW
17 BATTERY PLACE
NEW YORK, N.Y. 10004
212-222-4200

TELECOPIER: 212-222-4205

224 Dirksen January 15, 1998

The Honorable Orrin G. Hatch
Chair, Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

224-9102 - Fax - Mary Davis

Re: **The Honorable Sonia Sotomayor**, U.S.D.J. (SDNY)
Nomination to United States Court of Appeals, Second Circuit
Objection to Nomination

Gentlemen:

I am an attorney at law licensed to practice before the Federal and State Courts of the State of New York. On behalf of several clients, together with myself, I submit this letter and annexed Exhibits in opposition to the candidacy of the Honorable Sonia Sotomayor, U.S.D.J. for appointment to the United States Court of Appeals, Second Circuit.

In March, 1990, Alison E. Clapp ("**AEC**"), then 38 years of age, a Mount Holyoke College and Harvard Law School graduate, commenced an action in the United States District Court (SDNY) before Hon. Robert P. Patterson, Jr., U.S.D.J. (the "First Federal Action"), grounded upon Federal ERISA[1] jurisdiction, together with related partnership claims against an influential, national law partnership, **LeBoeuf, Lamb, Leiby & MacRae** ("**LeBoeuf**" or "**LLL&M**"). Thirty-seven (37) days later the district court granted a discovery stay. In August, 1990, the district court dismissed the Federal claims pursuant to Fed. R. 12(b)(6) upon the pleadings – notwithstanding LLL&M conceded and Federal procedural rule mandated Fed. R. 56 conversion to summary judgment. Thereupon, the district court declined to exercise pendent jurisdiction over related State claims, particularly partnership claims[2].

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[1] "ERISA" refers to Title 29 U.S.C. §§ 1132, *et seq.*, the Employee Retirement Income Security Act (1974).

[2] LLL&M had admitted the absence of any "expulsion provision" in the LLL&M partnership agreement, rather, contended an "alternative", the "at will dissolution defense". In early 1990, LLL&M had excluded AEC from the practice of her profession at LLL&M and physically had removed AEC's professional and personal papers and belongings from LLL&M's offices, then, unannounced delivered these materials in the street to AEC's residence. In the words of **LLL&M's counsel, "They [LLL&M] could tell her to leave if she wore the wrong color dress."** R. 352. Subsequently, in March, 1990, AEC filed the First Federal Action.

The First Federal Action is reported at *Clapp v. Greene*, 743 F.Supp. 273 (SDNY 1990) (the "**First Federal Opinion**""), *aff'd* 930 F.2d 912 (2nd Cir. 1991) (the "**First Summary Order**"), *cert. denied* __ U.S. __.

AEC's meritorious appeal to the Second Circuit was reviewed and denied by a Panel which included a LeBocuf client, Hon. Jon O. Newman, C.J. (Chief Judge, 1993-1997). The Second Circuit by summary order denied relief to AEC (the "**First Summary Order**"), notwithstanding plain error – mandated Fed. R. 12(b)(6) conversion to Fed. R. 56 standard[3].

The First Summary Order unfairly described the record, including an unfair description of the oral argument upon the appeal, *viz.*, concerning ERISA-claim-supporting [medical] facts, nonetheless the First Summary Order characterized as *"on appeal ... circumstances", rather than actual AEC affidavit facts* "presented to and not excluded" (Fed. R. 12(b)(6) which had assured ERISA jurisdiction – and reversal. The misdescription centers upon the circumvention, nonetheless, unfair "Beg the Question" characterizations concerning the central issue in the dispute: the absence of all evidence supporting any LLL&M dissolution "at will" or otherwise, more, the compelling existence of all evidence solely to the contrary, *i.e.*, the convincing evidence of sham defense, nonetheless, a defense repeatedly characterized prejudicially as though "actual". Subsequently, this prejudice was transferred into the State Court Action at every level – indeed, into the Second Federal Action – thereby, precluding to AEC any fair proceeding in any forum[4].

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116 L.Ed.2d 157 (1991). AEC sought relief in the Second Circuit, in particular upon the district court's allowance for LLL&M summary judgment motions (*"Sum. J. Motion"*) upon a contended sham defense against every claim, together with the discovery stay, the failure to docket applications for preliminary injunction, the adoption of *Trial By Affidavit* contention and impermissible inference in a "Background" which erroneously - and prejudicially - omitted all ERISA-claim-supporting medical facts, together with the grant of a represented dismissal on the pleadings without leave to amend, notwithstanding mandatory conversion to summary judgment apparent upon the face of the First Federal Opinion. The allowance of LLL&M's Sum J Motion under Fed. R. 56 *compelled* production from AEC of *all* evidence in support of *all* claims, including all [fourteen (14)] pendent claims; meanwhile, LLL&M was authorized to proceed against all AEC claims upon *memorandum contention* for "at will" dissolution and upon sparse and conclusory affidavits to the same effect by LLL&M's Chairs. The "form" of dismissal, i.e., represented Fed. R. 12(b)(6) dismissal, as well, thereby avoided mandatory findings/conclusions (Fed. R. 52(a)), notwithstanding actual conversion to Fed. R. 56 standard.

[3] Under **New York Partnership Law, §§ 80-81**, any law firm dissolution which included the continuation of business under the same firm name mandates (i) prompt filing in the County Clerk's office of a sworn "Certificate of Dissolution" signed by all firm partners and (ii) publication of a copy of such Certificate for four (4) consecutive weeks in a New York City newspaper. Notwithstanding that documentary evidence was presented to Patterson, Jr., D.J., and the First Federal Action Circuit Panel of LeBoeuf's (i) full statutory compliance with these Partnership Law provisions in 1977, nonetheless, (ii) absence of any statutory compliance with these provisions in 1990, the year of LeBoeuf's purported "at will dissolution" concerning AEC, these determinative facts and circumstances were not addressed by the district court nor the Circuit Court – nor by any court in any proceeding.

[4] AEC sought review upon a **Petition For Certiorari**, No. 91-249 (the "First Petition"). AEC identified as clearly erroneous/unfair the denial of a Federal forum grounded upon valid claims. Additionally, AEC asserted that the Circuit had failed to require recusal in consequence of the district court's conduct, *e.g.*,

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In consequence of this unfair denial to AEC of a Federal forum, in July, 1991, AEC commenced an action in the Supreme Court of the State of New York (the "**State Court Action**") including request for declaratory relief addressing the status of the LLL&M partnership and, again, pursuant to Partnership Law §§'s 80-81 seeking to enjoin LLL&M's unauthorized continuing use of LLL&M partnership name. The action was assigned to **Diane A. Lebedeff, Acting Justice**. In

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A. characterization of AEC's pleadings as a "***hold-up***" thirteen (13) days after commencement in the presence of LLL&M's counsel, immediately prior to the submission of LLL&M's Sum J Motion against all [then] fifteen (15) claims virtually exclusively upon a purported "at will" dissolution of the LLL&M entity upon the affidavit contention of Donald J. Greene, LLL&M's Chair ("Greene");

B. statements in June, 1990 - i.e., subsequent to AEC's application for preliminary injunction which required R. 52(a) findings/conclusions - representing understanding "of '**Big Firm' problems**" and ***urging AEC's abandonment of the legal system, adding that the ERISA litigation, one grounded upon medical distress, could be "long, arduous and bad for a party's health***," that the "press would have a field-day with this scandal", and for the ***first time, urging thhat AEC retain other "independent counsel***...";

C. statements in June, 1990, - notably, subsequent to acknowledgment of absence of any LLL&M "notice of dissolution" and absence of expulsion power in the agreement - that upon LLL&M's Sum J Motion, one which presented a single legal issue, the "at will" defense (characterized by the district court as leaving "everything up for grabs") that: "**I understand what they have done. They have continued the Partnership under the same name with different partners...**";

[Also in June, 1990, the district court, ***ex parte***, **placed under seal and impounded voluminous LLL&M Admin. Committee files**, ***inter alia***, which evidenced "the record of the Firm's activities over many years" and included evidence supporting a pretextual represented expulsion of [AEC]. (A312). These files had been submitted by AEC in opposition to LLL&M's Sum. J. Motion. Thereafter, pursuant to AEC application, the files were "... unsealed and made a part of the record". (A313). Subsequently, absent authorization, these previously "sealed" and "impounded" voluminous files were removed from the U.S. District Court's Clerk's Office. AEC was directed to replicate and replace these materials.]

D. **declining** in August, 1990, **to docket** AEC's June, 1990, **preliminary injunction application** upon grounds of failure in compliance with a local rule requiring contention of urgency, notwithstanding repeated affidavits of urgency and continuing **court-acknowledged, uncontested, irreparable injury**;

E. issuance of the First Federal Opinion representing grant of summary judgment to LLL&M "upon the pleadings" without leave to amend, notwithstanding published, express reliance upon prejudicial *Trial By Affidavit* LLL&M affidavits, as well, AEC affidavits - notably, however, **prejudicially omitting all ERISA-claim-supporting medical facts** contained in AEC's affidavits - nonetheless, upon said reliance thereby mandatorily converting the motion to Fed.R. 56 standard, and as well, issuance of the First Federal Opinion notwithstanding prior filing of mandamus application together with request for voluntary recusal; and

F. the addressing of AEC's recusal/preliminary injunction application in October, 1990: "I can't grant a preliminary injunction on these papers.... It requires a hearing .... You have maybe an equity right that this **is a sham dissolution. You maybe quite right...**", adding - but not to the Federal Supplement published opinion - that the published characterization of AEC as a "former" and "terminated" partner were not findings, but rather the "factual situation"; that **AEC's status "could be litigated to a fare-thee-well"**.

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August, 1991, - as in the First Federal Action upon immediate and comprehensive LLL&M summary judgment practice which included voluminous reliance upon Patterson, D.J.'s and Newman, C.J.'s unfair characterizations of LLL&M's purported, nonetheless, unevidenced "at will dissolution defense", and an *immediate discovery stay* - again, solely upon the same conclusory affidavit contentions, LLL&M presented the identical defense, the purported "at will" dissolution *as of* December 31, 1989, with contended "reconstitution" *as of* January 1, 1990; however, absent AEC.

LLL&M submitted this defense notwithstanding conceded absence of statutory expulsion power in LLL&M's agreement, conceded failure in application of statutory dissolution proceedings, and the absence of all evidence for compliance with §§ 80-81, the statutory authorization i.e., license, for continuing use of name *solely* upon sworn Certificate of Dissolution filing and publication. Thereafter, for the *first time* in this dispute, in September, 1991, LLL&M contended that such "at will" dissolutions occurred as annual "policy" since at least 1981. These contentions were supported solely by the same LLL&M Chair(s)' conclusory affidavits; *not* a piece of paper otherwise has been produced concerning this purported defense - nor so required by any judicial officer in any forum.

In February, 1992, Lebedeff, J. granted *summary judgment* to LLL&M *upon the pleadings*, i.e. upon all fourteen (14) claims, notably, again, upon "Beg the Question" avoidance of the central issue, the absence of determination by finding or judgment of the purported "at will" defense, nonetheless, unfairly characterized as though "actual" (the "**Lebedeff Ruling**")[5].

In consequence, in November, 1993, AEC commenced a second Federal action (the "**Second Federal Action**") against LLL&M, Lebedeff, J., and Justices of the Appellate Division of the Supreme Court of the State of New York (the "Judicial Defendants") grounded upon 28 U.S.C. § 1983, *i.e.*, a Federal "civil rights" action alleging sham dissolution, conspiracy, denial of due process particularly upon the complete preclusion of all discovery. The complaint sought

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[5] AEC's "Seventh Cause of Action" in the State Court Action before Lebedeff, J., stated:

> ¶68 Unless enjoined by this Court... LLL&M... will continue to engage in wrongful course of conduct ... including... represented exclusion of [AEC]... irreparable harm to... reputation... together with the continued illegal use of the LLL&M Partnership name... in breach of... §§ 80, 81...
>
> ¶70... [AEC] is entitled to a judgment... pursuant to... §§ 80, 81, enjoining the continued use of the [LLL&M]... partnership name..., is in breach of the Partnership Agreement and fails to satisfy... §§ 80-81.

Unfairly, however, the Lebedeff Ruling identified the Seventh (7th) Cause of Action, in full, as follow: "... (7) injunctive relief prohibiting the termination of the partnership." Thereupon, Lebedeff, J., directed summary judgment absent all discovery upon all fourteen (14) causes of action: the 7th Cause of Action upon the "at will" principle, simply, "must fall". There is no mention of §§ 80-81 in the entire Lebedeff Ruling.

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preliminary injunctive and other relief notably evidenced by LLL&M's non-compliance -- and judicial omission of requirement for compliance -- with Partnership Law §§ 80-81.

The lawsuit was assigned to **Sonia Sotomayor, D.J.** Again, grounded upon Patterson, D.J.'s and Newman, C.J.'s prejudicial characterizations of the "at will dissolution defense" and omission of enforcement of Partnership Law §§ 80-81 mandatory filing and publication requirements, LLL&M and the Judicial Defendants appeared at a hearing held December 20, 1993, before Sotomayor, D.J., seeking immediate dismissal of AEC's claims. Thereupon, Sotomayor, D.J., authorized LeBoeuf's and the Judicial Defendants' omnibus motions for dismissal of AEC's claims – with Sotomayor, D.J.'s promotion of sanctions against AEC and this counsel[6]

Four (4) months later, on March 31, 1994, at a hearing upon LLL&M's and the Judicial Defendants' motions to dismiss AEC's claims, Sotomayor, D.J., made an open-court statement before approximately 25 witnesses that Sotomayor, D.J., has/had a relationship with Lebedeff, J., *i.e.*, the New York State Judge assigned to AEC's State Court Action and the author of the Lebedeff Ruling, upon which AEC had grounded the § 1983 Federal Civil Rights action brought before Sotomayor, D.J. Subsequently, on August 12, 1994, Sotomayor, D.J., denied AEC's June, 1994, written request for an evidentiary hearing relating to Sotomayor, D.J.'s denial of the March 31, 1994, open-court statement of relationship to Lebedeff, J., and AEC's formal request for correction to the transcript of the March 31, 1994, hearing, which transcript page(s) record omission of all reference to Sotomayor, D.J.'s open-court announcement of relationship.

Seven (7) days later, *i.e.*, on August 19, 1994, upon a second misrepresentative, nonetheless, published Federal Supplement opinion relating to the LLL&M Dispute, Sotomayor, D.J., dismissed entirely AEC's Second Federal Action in an opinion which -- as did Lebedeff,

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[6] Two (2) days later, one (1) month subsequent to AEC's commencement of the Second Federal Action, *i.e.*, on December 22, 1993, at a transcribed oral argument in **The Olympia & York Dispute** before R. Winter, C.J. (Chief Judge, 1997-present), and McLaughlin, C.J., upon a record of meritorious appeal subsequent to a nearly six (6) week 1988 jury trial unsuccessfully brought by Olympia & York alleging $13.5M damages against this counsel's client FEI, Ltd. ("FEI") and others, upon a trial recorded "severance" of FEI's $5M claims, R. Winter, C.J. in addition unfairly to promoting Olympia & York's meritless objections to appellate jurisdiction, addressed "***Partnership Claims***" , notwithstanding that none existed upon said appeal.

Absent a decision upon the "severance" appeal, on September 15, 1994, *i.e.*, nine (9) months after oral argument before the Circuit – six (6) years after the documented severance and three (3) months after the Circuit's failure to docket an FEI June, 1994, letter requesting a decision – upon review of a *Crain's New York Business*, front-page report, "Bankruptcy feared at O&Y...", FEI filed a motion for decision to the Circuit. On the same day, September 15, 1994, several hours later, upon the unexplained and undated "recusal" of the Hon. W. Timbers, C.J., by a two (2) line Summary Order, Winter, C.J., and McLaughlin, C.J., dismissed FEI's $5M (untried) 1988 trial-severed claims. In pertinent part, transcript materials relating to the Olympia & York Dispute are annexed.

J.'s opinion – omits identification of AEC's pleading contentions and preliminary injunction application grounds for relief under Partnership Law §§ 80-81.

AEC appealed Sotomayor, D.J.'s dismissal of her claims to the Second Circuit. Six (6) months later, during the appeal – and nine (9) days prior to a scheduled oral argument -- on April 1, 1995, *The New York Times* publicly reported a "**mentor**" relationship between Cabranes, C.J., and Sotomayor, D.J. Accordingly, on April 7, 1995, AEC moved before the Circuit for recusal/reassignment, including objection to the continuing absence of evidentiary hearing relating to Sotomayor, J.'s open-court March 31, 1994, stated relationship to Lebedeff, J. On April 10, 1995, the date of oral argument of the appeal, AEC's motion for recusal/reassignment was denied.

On the next day, April 11, 1995, pursuant to another misrepresentative and unfair *pro forma* "Second Summary Order", a Circuit two-judge panel again denied all Federal relief to AEC[7]. Nonetheless, the Second Summary Order does not address the (i) significance of the reported "mentor" relationship between Cabranes, C.J., and Sotomayor, D.J., (ii) absence of evidentiary hearing relating to the March 31, 1994, open-court statement of relationship to Lebedeff, J., and (iii) continuing disinterest in any revelation of Partnership Law §§ 80-81's evidence of sham "at will dissolution" defense. Rather, the Second Summary Order states that Cabranes, C.J., "did not participate in the decision in this case"[8].

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[7]A recent demonstration of these Federal Courts' patent unfairness to AEC in the LLL&M Dispute may be reviewed in the 1996-1998 reported decisions in Florida and New York concerning partnership lawsuits brought against **Cadwalader, Wickersham & Taft** (the "**Cadwalader Dispute**"). In two (2) lawsuits, the national law partnership, Cadwalader, has been held accountable in Florida for $2.5M, including $500K in punitive damages, and in New York for $3M, upon a partnership agreement which, like LeBoeuf's, "... has no provision for the forced termination of partners" (emphasis added). In the Cadwalader Dispute, the invincible "at will dissolution defense" remains undiscovered.

[8]Throughout the LLL&M Dispute in all proceedings before all courts, all discovery has been precluded from the first day of suit commencement. Likewise, throughout the dispute, virtually immediately upon suit commencement, every allegation of every AEC pleading has been dismissed upon summary judgment application. AEC's just grievances against LLL&M never have been authorized by any court to leave the pleading stage at any time, nor any witness deposed, document produced, or discovery authorized – all, virtually exclusively originating upon LLL&M's "at will" dissolution submission -- a defense, nonetheless, statutorily unevidenced.

Contemporaneous with these events, during the period December, 1993 - June, 1997, in the **Merex v. Fairchild/Loral/Lockheed Dispute**, on behalf of Merex, this counsel had sought enforcement of a Fed. R. 16 "Final Pretrial Order" or "**PTO**" in effect for fifteen (15) months prior to trial in which a jury trial of all issues had been ordered by the district court, M.J. Lowe, D.J. (SDNY). The Second Circuit's unfair affirmance upon "advisory jury", notwithstanding omission of controlling reference to PTO court order for jury trial – analogous to the unfairness through "omission" documented in the LLL&M Dispute --is reported at 29 F.3d 821 (2nd Cir. 1994) (McLaughlin, C.J.).

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The Honorable Orrin Hatch
January 15, 1998
Page 7

Grounded upon these facts and circumstances and further as evidenced in the enclosed Exhibits, this counsel requests that the United States Senate upon due deliberation provide opportunity to this counsel – and, if appropriate, his clients -- for testimony and/or for submission of additional written materials relating to this objection to the candidacy of Sonia Sotomayor, D.J. for appointment to the United States Court of Appeals for the Second Circuit.

Very truly yours,

Daniel J. O'Callaghan

cc (w/out enclosures): The Honorable William Jefferson Clinton
President of the United States

Senate Judiciary Committee:

The Honorable Strom Thurmond	The Honorable Patrick J. Leahy
The Honorable Charles E. Grassley	The Honorable Edward M. Kennedy
The Honorable Arlen Specter	The Honorable Joseph R. Biden, Jr
The Honorable Fred Thompson	The Honorable Herb Kohl
The Honorable Jon Kyl	The Honorable Dianne Feinstein
The Honorable Mike DeWine	The Honorable Russell D. Feingold
The Honorable John Ashcroft	The Honorable Richard J. Durbin
The Honorable Spencer Abraham	The Honorable Robert G. Torricelli
The Honorable Jeff Sessions	

The Honorable Henry Hyde
Chair, House Judiciary Committee

The Honorable Sonia Sotomayor, U.S.D. J. ✓

cc (w/enclosures): The Honorable Janet Reno, Attorney General of the United States

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EXHIBITS IN SUPPORT

Ex 1	Copy of "First Federal Opinion" in the AEC v. LLL&M Dispute, reported at 743 F.Supp. 273 (SDNY 1990) (Robert P. Patterson, Jr., D.J.), together with Counsel Affirmation dated July 6, 1990, evidencing LLL&M's continuing non-compliance with Partnership Law §§ 80-81;
Ex 2	Copy of "First Summary Order" in the AEC v. LLL&M Dispute, dated March 29, 1991 (J. Walker, J. Newman, and L. Pierce, C.J.'s);
Ex 3	Copy of AEC's First Petition for Certiorari, No. 91-249, in the AEC v. LLL&M Dispute, in part, dated August 1, 1991;
Ex 4	Copy of the Lebedeff Ruling in the AEC v. LLL&M Dispute, dated February 14, 1992 (Hon. Diane A. Lebedeff, Acting Justice of the Supreme Court of the State of New York, New York County), together with copy of Appellate Division, First Department *pro forma* affirmance dated December 15, 1992;
Ex 5	Copy of the "Second Federal Opinion" in the AEC v. LLL&M Dispute, reported at 862 F.Supp. 1050 (SDNY 1994) (Sonia Sotomayor, D.J.);
Ex 6	Copy of "Second Summary Order" in the AEC v. LLL&M Dispute, dated April 11, 1995 (J. Walker and W. Feinberg, C.J.'s);
Ex 7	Copies of AEC Motions, dated April 7, 1995, and April 17, 1995, to the Second Circuit in the AEC v. LLL&M Dispute, re: *The New York Times*, April 1, 1995, report of Jose Cabranes, C.J., "Mentor" relationship to Sonia Sotomayor, D.J. and objection to continuing absence of evidentiary hearing relating to Sonia Sotomayor, D.J.'s open-court March 31, 1994, stated relationship to Diane A. Lebedeff, J.;
Ex 8	Copies of published reports of Florida decision and New York verdict in the *Cadwalader, Wickersham & Taft* partnership dispute, dated July 25, 1996, December 23, 1997, and January 2, 1998;
Ex 9	Copy of Relevant Excerpts from the O&Y Dispute: 1988 Trial and December 22, 1993, Oral Argument before the Second Circuit Court of Appeals
Ex 10	Copies of correspondence exchanged between this counsel and the Advisory Committee on Civil Rules, Committee on Rules of Practice and Procedure (and the Congress's Judiciary Committees), dated December 12, 1994 - August 2, 1995.

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SONIA SOTOMAYOR
MEETINGS WITH SENATE STAFFERS
SCHEDULE
FRIDAY, JANUARY 23

1:00 Meeting with Jonathan Yarowsky
Room #128/130 Old Executive Office Building
(202/456-7911)

2:00 Laurel Pressler
Staff Director
Office of Senator DeWine
Russell #140
(202/224-2315)

2:45 Lee Otis (with Chase Huttow)
Chief Counsel of Senator Abraham's Immigration Subcommittee
Office of Senator Abraham
Dirksen #323
(202/224-4822)

3:30-5:00 Duke Short (tentative -- will call before meeting)
Chief of Staff
Office of Senator Thurmond
Russell #217
(202/224-5972)

THE ASSOCIATION OF THE BAR
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June 5, 1998

Charles Ruff, Esq.
Counsel to the President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Ruff:

We are writing to inform you that the Committee on the Judiciary of the Association of the Bar of the City of New York has found Sonia Sotomayor APPROVED for appointment to the United States Court of Appeals for the Second Circuit.

Very truly yours,

Daniel F. Kolb